

No. 75-1815

Supreme Court, U. S.  
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MICHAEL RODAK, JR., CLERK

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*In the Supreme Court of the United States*

OCTOBER TERM, 1976

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JAMES C. GABRIEL, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION

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*ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF NEW JERSEY*

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MOTION TO DISMISS

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ROBERT H. BORK,  
*Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.*

ROBERT S. BURK,  
*Acting General Counsel,  
Interstate Commerce Commission,  
Washington, D.C. 20423.*

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Pursuant to Rule 16(1)(a) of the Rules of this Court, the Solicitor General, on behalf of the United States of America and the Interstate Commerce Commission, moves that this appeal be dismissed.

This is a direct appeal from an order of a three-judge district court denying appellant's motion to join the Internal Revenue Service as a plaintiff in an action originally brought by appellant. The action in which the order was entered was brought to set aside an order of the Interstate Commerce Commission. The Commission had approved in that order, pursuant to Section 20a of the Interstate Commerce Act (49 U.S.C. 20a), the issuance of securities by the Missouri Pacific Railroad Company ("MoPac") as part of a plan of recapitalization. *Missouri Pacific R. Co. Securities*, 347 I.C.C. 377. This plan of recapitalization constituted the settlement of a class action suit brought

by holders of Class B MoPac stock. Appellant is a dissatisfied member of that class.

On January 27, 1976, appellant moved to join the Internal Revenue Service as a plaintiff (J.S. 1-2). The stated purpose of the proposed joinder was to enable the IRS to collect certain capital gains taxes that appellant asserted were owed because of stock transfers made pursuant to the recapitalization (J.S. 2). On March 17, 1976, the court entered an order denying appellant's motion (J.S. App. 23-24).

The appeal should be dismissed for want of jurisdiction. Appeals to this Court from orders entered by three-judge district courts are governed by 28 U.S.C. 1253, which allows appeals only "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction \* \* \*." The order appellant seeks to appeal, denying his motion to join the IRS as a plaintiff in his action, is not an order "granting or denying \* \* \* an interlocutory or permanent injunction"; rather, it is an interlocutory ruling of a type from which a direct appeal may not be taken to this Court. *Goldstein v. Cox*, 396 U.S. 471, 477; see also *Mitchell v. Donovan*, 398 U.S. 427, 430-432.

Furthermore, the appeal is untimely. As noted, the court entered its order denying appellant's motion to join the IRS as a plaintiff on March 17, 1976 (J.S. 23-24). The 30-day period provided by 28 U.S.C. 2101(a) for appealing "from an order granting or denying \* \* \* an interlocutory or permanent injunction" and by 28 U.S.C. 2101(b) for "[a]ny other direct appeal to the Supreme Court which is authorized by law" from an interlocutory order expired on April 16, 1976. The notice of appeal was not filed until April 23, 1976. The time limits specified by 28 U.S.C. 2101 are jurisdictional (see *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445-446).

It is therefore respectfully submitted that the appeal should be dismissed.

ROBERT H. BORK,  
*Solicitor General.*

ROBERT S. BURK,  
*Acting General Counsel,*  
*Interstate Commerce Commission.*

AUGUST 1976.